(3)

No. 90-253

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL ENGINEERING & CONTRACTING CO.,
PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the exception to coverage in Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), for "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health," applies to construction work governed by a contract with the Army Corps of Engineers.

2. Whether the Army Corps of Engineers had authority to consent to an inspection of the construction work site by the Occupational Safety and Health Administration (OSHA).

3. Whether OSHA acted within the scope of its statutory authority and complied with the Fourth Amendment to the Constitution when it conducted its June 1988 inspection of the construction work site.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 902 F.2d 34 (Table) and appears at 14 O.S.H. Rep. (BNA) 1621. The decision of the district court (Pet. App. 3a-8a) is reported at 687 F. Supp. 1219. The magistrate's order that the district court affirmed (App., *infra*, 1a-3a) is unpublished.[1] The decision of

[1] The magistrate's recommended decision that petitioner includes in its appendix (Pet. App. 9a-15a) resulted in a district court order (App., *infra*, 4a-5a) dismissing petitioner's action. Petitioner appealed the district court's order of dis-

the Occupational Safety and Health Review Commission's ALJ (Pet. App. 16a-29a) is summarized at 13 O.S.H. Cas. (BNA) 1817.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. The petition for a writ of certiorari was filed on August 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To achieve this purpose, the Act requires employers to keep their work places free from recognized hazards likely to cause death or serious physical harm to their employees and also requires employers to comply with occupational safety and health standards promulgated by the Secretary of Labor. 29 U.S.C. 654(a) and (b).

The Secretary enforces the OSH Act primarily by issuing citations to employers who she determines have violated the Act or any duly promulgated standard. 29 U.S.C. 658. In conjunction with her authority to issue citations for violations, the Secretary pro-

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missal and later dismissed its appeal. The court of appeals' order of dismissal (App., *infra*, 6a), the district court order, and the magistrate's recommended decision are not officially reported, but the district court's order appears at Empl. Safety & Health Guide (CCH) ¶ 28,104. Neither the magistrate's recommended decision nor the two court orders referred to in this footnote are the bases for the instant petition.

poses civil penalties (29 U.S.C. 659(a), 666), prescribes abatement periods (29 U.S.C. 658(a), 659 (b)), and may seek injunctive relief in federal district court against violations posing imminent danger to employee safety and health (29 U.S.C. 662). Contested citations, which are adjudicated before the Occupational Safety and Health Review Commission (29 U.S.C. 659, 661), and district court decisions regarding injunctions may be reviewed in the courts of appeals (29 U.S.C. 660(a) and (b); 28 U.S.C. 1292(a)(1)).

"In order to carry out the purposes of th[e] [Act]," the Secretary has broad authority to enter a work site "without delay and at reasonable times" and inspect pertinent conditions. 29 U.S.C. 657(a). In addition, the Secretary is specifically authorized to inspect a work site in response to an employee's notification of a violation that threatens physical harm. 29 U.S.C. 657(f)(1); see generally *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (warrant required for inspections absent employer consent).

In general, the Secretary's inspection authority, as well as the other provisions in the OSH Act, apply broadly to "employment performed in a workplace," 29 U.S.C. 653(a). One exception to this coverage is set forth in Section 4(b)(1) of the Act:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. 653(b)(1).

2. Petitioner is a construction company that contracted with the Department of Defense's Army Corps of Engineers to perform flood control work on a section of Mill Creek in Cincinnati, Ohio. Pet. App. 2a, 3a, 10a. The Corps had authority over the Mill Creek flood control project (*id.* at 13a) by virtue of its statutory mandate under the Flood Control Act, 33 U.S.C. 701 *et seq.*, and its contract with the owner of the property (Pet. 3).

The Corps' contract with petitioner required petitioner to comply with OSHA's Safety and Health Regulations for Construction, 29 C.F.R. Pt. 1926, and OSHA's general Occupational Safety and Health Standards applicable to construction, 29 C.F.R. Pt. 1910. Pet. App. 11a-12a; see 48 C.F.R. 52.236-13. The contract also required petitioner to take any "additional measures" to ensure job site safety that the Corps determined to be reasonably necessary. Pet. App. 11a-12a; 48 C.F.R. 52.236-13. The Corps had the right under the contract to inspect petitioner's work and to issue stop work orders if safety or other contractual problems arose, Pet. 3, but did not have OSHA's statutory authority to assess penalties, require abatement, or seek injunctive relief.

The events that gave rise to this case began on October 21, 1986, when an accident occurred at the Mill Creek site. On that day, one of petitioner's trucks came in contact with energized overhead power lines, causing injury to several employees. Pet. App. 4a, 10a.

Two days later, on October 23, 1986, OSHA began a comprehensive inspection of petitioner's activities at the Mill Creek site. Pet. App. 4a. This inspection was mandated under OSHA's then-established procedure of instituting a comprehensive site

inspection to investigate any accident involving a "high-hazard industry," as OSHA had determined the construction industry to be. *Ibid.* The Corps consented to this comprehensive inspection, but petitioner did not, insisting instead that OSHA limit its inspection to the immediate area of the accident. *Id.* at 10a, 11a. OSHA conducted only a limited inspection that day, and later secured a warrant allowing a complete inspection. *Id.* at 10a.

Petitioner thereupon filed motions in federal district court to stay execution of the warrant and to quash the warrant. Pet. App. 9a-10a. In addition, petitioner filed an action for declaratory and injunctive relief against future OSHA inspections of the project, and all these matters were referred to the same magistrate. *Id.* at 10a. The magistrate stayed execution of the warrant pending a hearing. *Ibid.*

3. After a hearing, the magistrate recommended dismissal of petitioner's action for declaratory and injunctive relief. Pet. App. 9a-15a. He also lifted the stay of execution of the warrant and declared that the motion to quash the warrant was moot.[2]

The magistrate rejected petitioner's argument that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), preempted OSHA regulation of petitioner's activities. The magistrate determined that Section 4(b)(1) did not apply because in this case the Corps was not exercising statutory authority "pursuant to enabling legislation the purpose of which was to affect occupational safety and health." Pet. App. 13a. In so ruling, the magistrate relied on several deci-

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[2] The latter ruling appears to have been based on the fact that the search warrant was not used. Pet. App. 11a, 14a. The magistrate thus had no occasion to address the validity of the warrant.

sions of the Occupational Safety and Health Review Commission. In particular, he noted that *Luhr Bros.*, 5 O.S.H. Cas. (BNA) 1970 (1977), presented "a situation similar to the instant case" and held that Section 4(b)(1) did not preempt OSHA regulation of a subcontractor working on a Corps flood control project. Pet. App. 14a.

The magistrate also determined that the Corps had authority over the Mill Creek flood control project and so could give valid consent to OSHA's inspection of the site despite petitioner's objection. Pet. App. 12a-13a. The magistrate accordingly concluded that OSHA could complete its inspection of the site, adding that the inspection "should be completed within six months of this order." *Id.* at 14a.

On November 20, 1987, the district court adopted the magistrate's factual findings and legal determinations and dismissed petitioner's action. App., *infra*, 4a-5a.

On March 14, 1988, the court of appeals granted petitioner's motion for voluntary dismissal of its appeal from the district court's order. App., *infra*, 6a.

4. While petitioner was litigating OSHA's inspection authority in district court, OSHA sought enforcement of the citation it had issued against petitioner based on the limited inspection of the accident site that petitioner had permitted. After a hearing, a Commission ALJ vacated the citation on May 3, 1988. Pet. App. 16a-29a. In that order, the ALJ rejected as "without merit" petitioner's arguments that Section 4(b)(1) preempted OSHA's jurisdiction and that the Corps had no authority to consent to an OSHA inspection. Pet. App. 26a. The ALJ did not discuss the basis for rejecting those arguments "because all items of the citation have been vacated." *Ibid.*

5. a. After petitioner had voluntarily dismissed its appeal from the district court decision, OSHA again obtained the Corps' consent to complete the comprehensive inspection of petitioner's operations that was interrupted by the district court litigation. Pet. App. 4a-5a. Petitioner again sought a stay of the inspection from the same district court magistrate. Pet. 5. The magistrate again entered a temporary stay halting the inspection and later lifted that stay. The order lifting this second stay was entered on June 7, 1988. *Ibid.*

In his June 7, 1988 order, the magistrate held that OSHA continued to have valid consent from the Corps to complete its inspection of the Mill Creek site. App., *infra*, 2a. The magistrate rejected petitioner's contentions that OSHA was stripped of authority to complete its inspection by (1) the vacatur of OSHA's citation to petitioner and (2) the expiration of six months after the magistrate's March 11, 1987 order. *Ibid.* With regard to the second contention, the magistrate concluded that the six-month period set in his earlier order ran from March 14, 1988, the date on which the court of appeals dismissed petitioner's appeal of the magistrate's earlier order (as adopted by the district court). *Ibid.*

b. On June 10, 1988, after another hearing, the district court affirmed and adopted the magistrate's June 7, 1988 order. Pet. App. 3a-8a.

The court found that OSHA's renewed inspection was consistent with the Corps' consent and with a general administrative plan. Pet. App. 5a. Based on these findings and on the magistrate's "reasonabl[e] interpret[ation]" of his March 1987 order authorizing the renewed inspection (*id.* at 7a), the court held that the inspection did not violate the Fourth Amend-

ment or the OSH Act. The court cited three bases for its Fourth Amendment holding: that the inspection was conducted pursuant to (1) the valid consent of the Corps; (2) a general administrative plan; and (3) "the equivalent of a warrant," namely, the magistrate's March 1987 order.[3] *Id.* at 5a-7a. The second basis justified the court's holding (*id.* at 6a) that the inspection likewise complied with the OSH Act.

The court did grant petitioner some relief on its motion for a stay. Specifically, the court ordered that OSHA limit its inspection to "plain sight" and complete the inspection within five days. Pet. App. 7a.

6. The court of appeals consolidated appeals by petitioner from the ALJ's May 3, 1988 decision on the Section 4(b)(1) and consent issues and the district court's June 10, 1988 order. In a brief per curiam opinion, the court of appeals found "no error by either the administrative law judge or the district court warranting reversal" and therefore affirmed both decisions. Pet. App. 2a.

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[3] In connection with the third basis for its decision, the court held that OSHA carried out its inspection within the six-month period established in the magistrate's order of March 11, 1987, because that period ran from March 14, 1988, the date petitioner's appeal of that order was dismissed. The court observed that to hold otherwise would "penalize [OSHA] for voluntarily suspending its administrative procedure pending termination of litigation involving the validity of that procedure." Pet. App. 7a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any court of appeals. Further review is therefore not warranted.

1. Petitioner renews its contention (Pet. 7-10) that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653 (b)(1), preempts OSHA regulation of petitioner's activities. The text of Section 4(b)(1) defeats this contention, for it imposes two statutory conditions for preemption, neither of which is met here.

Section 4(b)(1) provides that the Act does not apply to working conditions

> with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. 653(b)(1). In accordance with its terms, Section 4(b)(1) has been uniformly construed by lower courts to apply only when a coordinate agency (1) has "statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health"; and (2) actually exercises this authority. *Ensign-Bickford Co.* v. *Occupational Safety & Health Review Comm'n*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), cert. denied, 466 U.S. 937 (1984); *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 915-916 & n.7 (3d Cir. 1980); *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1166-1169 (D.C. Cir. 1975). Petitioner does not, and cannot, cite any statute or regulation to show that either of these two conditions has been met in this case. See Pet. 7-10.

a. The first condition of Section 4(b)(1) requires that a statute invest an agency with authority to prescribe health or safety standards either expressly or by necessary implication. Congress could easily have drafted that provision to apply whenever an agency incidentally regulated worker safety pursuant to a statutory delegation that did not itself relate to worker safety. That Congress did not do so evidences an intent "to apply OSHA forthwith across the board, but to provide that regulation might be preempted by other agencies with *comparable* authority." *Baltimore & O.R.R.* v. *Occupational Safety & Health Review Comm'n*, 548 F.2d 1052, 1054 (D.C. Cir. 1976) (emphasis added).[4]

The Army Corps of Engineers has no statutory authority comparable to OSHA's. In this case, the Corps was acting under its legislative authority to carry out flood control projects and under the Department of Defense's authority to contract with private persons for services. Flood Control Act, 33 U.S.C. 701 *et seq.*; Armed Services Procurement Act of 1947, 10 U.S.C. 2301 *et seq.*; see also 10 U.S.C. 3013 (responsibilities of Secretary of the Army). As the magistrate stated, the flood-control legislation "does not address the protection of contractor employees who are actually engaged in the conduct of flood

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[4] The intent of Congress to impose this condition is confirmed by the legislative history of Section 4(b)(1). See, *e.g.*, Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, 997 (remarks of Rep. Steiger); *id.* at 1019 (remarks of Rep. Daniels); *id.* at 1204 (remarks of Rep. Perkins) (Comm. Print 1971).

control rather than sharing its benefits." Pet. App. 14a (quoting *Luhr Bros.*, 5 O.S.H. Cas. (BNA) 1970, 1974 (1977)). And as the Review Commission observed in the closely analogous case of *Luhr Bros.*, 5 O.S.H. Cas. (BNA) at 1973, the purpose of defense-procurement authority "is obviously to standardize and to make efficient Defense procurement procedures. Any benefits of job safety and health are at best incidental." See also *Paul* v. *United States*, 371 U.S. 245, 250-263 (1963) (primary purpose of predecessor procurement statutes was to secure contracts that were most advantageous to government).[5]

Rather than identify a statutory source of authority, petitioner relies on the Corps' authority under its contract with petitioner. See Pet. 8. This reliance is misplaced, because the Corps' *contract right* to require site-specific work procedures and inspect petitioner's work site for compliance with them clearly is not an "exercise [of] *statutory authority* to prescribe or enforce standards or regulations." 29 U.S.C. 653(b)(1) (emphasis added). To conclude otherwise would not only contradict the text of Section 4(b)(1); it would also force the armed services to shoulder OSHA's mandate "to set mandatory occupational safety and health standards," 29 U.S.C. 651(b)(3), thereby diverting the services from their express statutory mission, in this setting, to ensure "that property and services be acquired * * * in the most

[5] In *Luhr Bros.* and two other decisions, the Review Commission has held that regulations promulgated pursuant to general statutory procurement authority do not, by virtue of Section 4(b)(1), preempt OSHA regulation. *Haas & Haynie Corp.*, 4 O.S.H. Cas. (BNA) 1911 (1976); *Gearhart-Owen Indus., Inc.*, 2 O.S.H. Cas. (BNA) 1568 (1975).

timely, economic, and efficient manner." 10 U.S.C. 2301(a).[6]

b. For similar reasons, petitioner cannot show that with respect to petitioner's activities the Corps has "prescribe[d] or enforce[d] standards or regulations affecting occupational safety or health," 29 U.S.C. 653(b)(1).

The Corps' ability to impose and enforce health and safety requirements in this case derived solely from its contract with petitioner. The contract incorporates OSHA regulations and the Corps' safety and health manual and requires petitioner to comply with them. Pet. 3; Pet. App. 11a-12a.[7] The Corps' ability to enforce these requirements is limited to the issuance of stop work orders. Pet. 3.

As the lower courts have held, such contractual provisions do not constitute the "prescri[ption] or enforce[ment] [of] standards or regulations." For example, in *Ensign-Bickford Co.* v. *Occupational Safety & Health Review Comm'n*, 717 F.2d 1419,

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[6] Petitioner asserts (Pet. 9) that the Corps can effectively enforce the OSH Act without OSHA's assistance, pointing to the ALJ's vacatur of the citation that OSHA issued after its limited inspection of the October 1986 accident. Petitioner admits, however (Pet. 6 & n.3), that OSHA's complete inspection in June 1988 resulted in new citations that were affirmed by an ALJ. *Secretary of Labor* v. *National Engineering & Contracting Co.*, OSHRC No. 88-2059 (ALJ Oct. 31, 1989), appeal pending, No. 90-3080 (6th Cir.).

[7] Petitioner does not contend that the Corps' safety manual is a "standard[]" or "regulation[]" within the meaning of Section 4(b)(1). Cf. *PBR*, 643 F.2d at 896-897 (safety rules formulated by engineering consultant for government contractor were analogous to internal safety regulations and therefore were not "standards" or "regulations" under Section 4(b)(1)).

1421 (1983), cert. denied, 466 U.S. 937 (1984), the D.C. Circuit held that the Department of Defense did not preempt OSHA regulation when it imposed on a contractor the contractual obligation to comply with a Department safety manual. Similarly, in *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896-897 (1981), the First Circuit rejected the contention that Section 4(b)(1) required preemption when the Secretary of Transportation used a consulting engineer to draft safety rules that were incorporated in procurement contracts. The First Circuit stated, in language equally applicable here, that for purposes of Section 4(b)(1) "an agency may not 'promulgate' a 'rule' through contractual arrangements." 643 F.2d at 897.

The Corps' reliance upon OSHA standards and enforcement responsibilities in prescribing petitioner's contract obligations reflects the practice of the armed services with regard to defense contractors. The terms of the contract with petitioner were governed by the Department of Defense's Federal Acquisition Regulations System, 48 C.F.R. 1.000 *et seq.* The System in pertinent part relies in turn on OSHA regulations rather than on a separate body of safety and health requirements for defense contractors. See 48 C.F.R. 52.236-13. As such, the System reflects the Department's position that with respect to such contractors OSHA remains the agency responsible for enforcing the OSH Act. See *Luhr Bros.*, 5 O.S.H. Cas. (BNA) at 1974.

In sum, neither the contract nor the procurement regulations under which the contract was executed provide any basis for concluding that Congress or the Defense Department intended to preclude OSHA regulation of the activities at issue here.

c. Contrary to petitioner's assertion (Pet. 9), the holdings below that petitioner is subject to OSHA regulation do not implicate Congress's concern in the Act to avoid "regulatory duplication," *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977). The inspection that gave rise to this case was carried out solely by OSHA, with the Corps' consent. See Pet. 4-6. Petitioner thus has not been subjected to conflicting requirements at the hands of the two agencies. Cf. *U.S. Air, Inc.* v. *Occupational Safety & Health Review Comm'n*, 689 F.2d 1191 (4th Cir. 1982) (preemption found where FAA regulation required doors of airline lounge be closed but OSHA regulation required they be kept open).[8]

In any event, "avoiding duplication was a secondary purpose of the [OSH Act's] scheme." *Southern Pac.*, 539 F.2d at 392. This purpose cannot override the primary purpose of the Act to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. 651(b). Acceptance of petitioner's contract-based arguments would have this effect, for it would "dilute, without congressional approval, the safety standards and remedies contained in the Act." *Ensign-Bickford Co.*, 717 F.2d at 1421.

2. Petitioner disputes (Pet. 11-13) the holdings of the courts below that OSHA carried out its two inspections of the Mill Creek work site with the "valid third party consent" of the Corps. Pet. App. 6a; see also *id.* at 12a. Petitioner does not dispute

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[8] Moreover, petitioner is in no position to complain about "double exposure," since it agreed in its contract with the Corps to be subject to both OSHA standards and the Corps' safety and health manual. Pet. App. 12a.

the well settled principle underlying these holdings: that a warrantless search by law enforcement officers is valid under the Fourth Amendment if based on the "consent of one who possesses common authority over [the searched] premises." *United States* v. *Matlock*, 415 U.S. 164, 170 (1974); see also *Illinois* v. *Rodriguez*, 110 S. Ct. 2793 (1990) (warrantless search is valid if officers, at time of entry, reasonably believe third party has common authority). Rather, petitioner makes the fact-bound contention that the Corps lacked "common authority" over the Mill Creek site. Pet. 11-13. This contention is mistaken.

" '[C]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes,' " *Rodriguez*, 110 S. Ct. at 2797 (quoting *Matlock*, 415 U.S. at 171 n.7), "so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7.

The courts below correctly concluded that the Corps had "common authority" over the Mill Creek site. As detailed in the petition (Pet. 3), in its contract with petitioner the Corps retained the right to inspect the work site. Moreover, the Corps exercised this right; it conducted daily inspections of work progress as well as periodic safety surveys. *Ibid.* It is true, as petitioner notes (Pet. 3, 12), that the Corps did not own the site, but neither did petitioner. Petitioner's right to occupy the site derived solely from its contract with the Corps, which in turn derived its right of access directly from the property owner. See Pet.

3. In this respect, petitioner was in the same situation as a subcontractor, with the Corps functioning as a general contractor. As such, petitioner had no reasonable expectation of privacy, because it "assumed the risk" that the Corps might permit a third party to search the site. *Matlock*, 415 U.S. at 171 n.7.[9] For these reasons, the courts below properly concluded that the Corps had authority to consent to OSHA's inspections.

This conclusion is not altered by the fact that petitioner objected to the inspections. See Pet. 13. "The touchstone of *Matlock*'s third party consent analysis is that any reasonable expectation of privacy in common areas is lost once joint occupants assume the risk that a co-occupant will allow access to the common areas." *Donovan* v. *A.A. Beiro Constr.*, 746 F.2d 894, 899 (D.C. Cir. 1984). "The additional fact that the interested party has denied consent does not increase a reasonable expectation of privacy." *J.L. Foti Constr. Co.* v. *Donovan*, 786 F.2d 714, 717 (6th Cir. 1986) (internal quotation marks omitted) (quoting *United States* v. *Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977), cert. denied, 435 U.S. 932 (1978)).[10]

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[9] See also *J.L. Foti Constr. Co.* v. *Donovan*, 786 F.2d 714, 716-717 (6th Cir. 1986) (general contractor has authority to consent to OSHA inspection of area in which subcontractor worked); *Donovan* v. *A.A. Beiro Constr. Co.*, 746 F.2d 894, 898-901 (D.C. Cir. 1984) (owner with full right of access may permit OSHA inspection of prime contractor's work activities).

[10] Moreover, petitioner did not raise in the court of appeals the issue whether a third party's consent to a search is valid over the objection of a co-occupant. Petitioner provides no reason why this Court should depart from its practice of not granting review in this situation. See *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Youakim* v. *Miller*, 425 U.S. 231 (1976).

In any event, petitioner's contention regarding the Corps' "common authority" reflects only petitioner's disagreement with factual findings by the courts below concerning the Corps' control of the Mill Creek site. Such a fact-bound dispute does not warrant this Court's review.

3. This Court likewise should not grant review to consider petitioner's erroneous contention (Pet. 14-17) that OSHA violated the Fourth Amendment and the OSH Act when it completed its comprehensive inspection of the Mill Creek site in June 1988.

We have shown above that OSHA's inspections did not violate the Fourth Amendment, because they were carried out with the valid consent of the Corps. Since OSHA had consent for these inspections, it did not need to demonstrate probable cause justifying issuance of a warrant. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); *A.A. Beiro Constr.*, 746 F.2d at 903-904.[11]

Furthermore, as the courts below held, "probable cause" did exist for OSHA's June 1988 inspection. Pet. App. 6a. The "probable cause" standard, this Court has made clear, is met when OSHA inspects a work site "on the basis of a general administrative plan." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 321 (1978). That was the case here: OSHA conducted the June 1988 inspection pursuant to an administrative policy then in effect that called for a comprehensive inspection whenever an accident occurred in a "high-hazard industry," as OSHA considered the construction industry to be. Pet. App. 4a, 6a.

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[11] Petitioner concedes (Pet. 11) that OSHA "relied exclusively upon consent granted to it by the Corps to tour the premises."

For the same reason, OSHA's June 1988 inspection complied with the OSH Act. The inspection was conducted under an administrative plan designed "to carry out the purposes of th[e] [Act]," 29 U.S.C. 657(a), and occurred at a "workplace or environment where work is performed by an employee of an employer." [12]

In sum, the courts below correctly held that OSHA's June 1988 inspection did not violate the Fourth Amendment or the OSH Act. Pet. 6a. See *A.A. Beiro Constr.*, 746 F.2d at 898; *In re Cerro Copper Prods. Co.*, 752 F.2d 280 (7th Cir. 1985).[13]

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[12] There is no merit to petitioner's suggestion (Pet. 15) that OSHA was stripped of authority to seek the Corps' consent for completion of OSHA's inspection when the ALJ vacated the citation issued on the basis of OSHA's preliminary inspection. As the courts below found (Pet. App. 4a) and petitioner does not dispute, OSHA returned to the Mill Creek site in June 1988 to complete the comprehensive inspection that it had begun in October 1986. In doing so, as noted in the text, OSHA was carrying out the administrative policy then in effect. The intervening vacatur of the earlier citation did not render effectuation of this policy unnecessary, as is clear from the fact that OSHA issued additional citations upon completing the inspection. Pet. 6 & n.3.

[13] Because the June 1988 inspection complied with the requirements of the Fourth Amendment and the OSH Act, petitioner's assertion (Pet. 16) that the inspection was not "further validated by the Magistrate's Order of March 11, 1987" is beside the point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1990

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Mag. No. 86-0136-J

IN THE MATTER OF INSPECTION OF:

THE CONSTRUCTION SITE AT:

SECTION 4-A OF THE MILL CREEK PROJECT,
KINGS RUN AND SPRING GROVE AVENUE,
CINCINNATI, OHIO 45232

Civil No. C-1-86-1119

NATIONAL ENGINEERING AND
CONTRACTING COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA,
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DEFENDANTS

ORDER

[Filed June 7, 1988]

This matter is before the Court pursuant to plaintiff's motion for a protective order (doc. 15); plaintiff's supplemental memorandum (doc. 16); defendant's response (doc. 17); an order directing a tem-

porary stay (doc. 19); and defendant's motion to lift the temporary stay (doc. 20).

This Court issued an order and a report and recommendation on March 11, 1987. The Court found that National Engineering and Contracting Company was required to comply both with Occupational Safety and Health Administration (OSHA) standards and the Corps of Engineers standards. However, OSHA was required to have the consent of the Corps before it could inspect. The Court also found that OSHA could inspect Section 4-A, but not the entire Mill Creek Project and that such inspection was to be completed in six months.

National argues that since Judge Burroughs, an administrative law judge, found on May 3, 1988 that National was not in violation of any of the safety standards for which it was cited, OSHA has no right to reenter the premises for another inspection. Judge Burroughs did not address the issues of jurisdiction and consensual search.

OSHA argues that it is completing the comprehensive inspection of the entire worksite of Section 4-A, which has been delayed by litigation before the magistrate, district court judge, and appeals court.

The Court finds today that OSHA still has the Corps' consent to conduct an investigation of Section 4-A (*see* doc. 20, exhibit g) and that the six months in which to conduct an investigation run from March 14, 1988, the date National's appeal was dismissed before the Court of Appeals.

We order the stay which was granted on June 3, 1988 lifted. OSHA may conduct its investigation of Section 4-A within six months of March 14, 1988.

It is questionable whether these motions should have been brought before the Court in this case since

U.S. District Court Judge Weber adopted the Magistrate's recommendation that the case be closed on November 20, 1987. However, we have reviewed the motions and the case is now closed.

Each side is to bear its own costs.

SO ORDERED.

/s/ J. Vincent Aug, Jr.

J. VINCENT AUG, JR.
United States Magistrate

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-86-1119

NATIONAL ENGINEERING &
CONTRACTING COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEPT. OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION, DEFENDANT

ORDER

[Filed Nov. 20, 1987]

This matter is before the Court upon the Report and Recommendation of the United States Magistrate (doc. no. 6) and the objections and responses thereto (doc. nos. 8 and 9). The Magistrate made specific findings and concluded that the issues involving the search warrants have been rendered moot and he recommends that this action be dismissed.

Upon consideration, the Court finds that the Magistrate has clearly and accurately set forth the law and has properly applied it to the particular facts of this case. Having reviewed the record in light of the objections, the Court finds that the arguments made have either been adequately addressed and properly disposed of by the Magistrate in his decision or present no particularized contentions that warrant specific responses.

Accordingly, the Court hereby ADOPTS the factual findings and legal reasoning of the Magistrate's Report and Recommendation and, therefore, this action is hereby DISMISSED.

IT IS SO ORDERED.

/s/ Herman J. Weber

HERMAN J. WEBER
Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-4152

NATIONAL ENGINEERING & CONTRACTING CO., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEFENDANT-APPELLEE

ORDER

[Filed Mar. 14, 1988]

In accordance with Rule 18, Rules of the Sixth Circuit, and upon consideration of the Motion for Voluntary Dismissal filed by the Appellant,

IT IS ORDERED that the appeal be and it hereby is dismissed pursuant to 42(b), Federal Rules of Appellate Procedure.

ENTERED PURSUANT TO RULE 18(c)
RULES OF THE SIXTH CIRCUIT
JOHN P. HEHMAN
Clerk

/s/ Leonard Green
LEONARD GREEN
Chief Deputy Clerk

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